

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

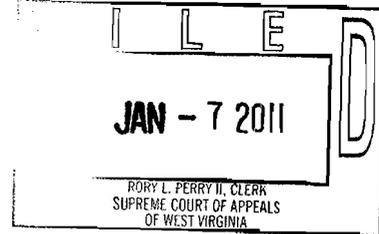
JOSEPH CASACCIO and  
NATIONAL INDEMNITY COMPANY,

Petitioners,

v.

Docket No. ~~10-080~~ 101527

HAROLD A. CURTISS, Executor of  
the Estate of Norma Lee Curtiss, Deceased,  
HAROLD A. CURTISS, Administrator of  
the Estate of Mary Lynn Curtiss, Deceased;  
and HAROLD A. CURTISS, Executor of the  
Estate of Charles E. Curtiss, Deceased,



Respondent/Plaintiff Below,

v.

CIVIL ACTION NO. 05-C-1118  
Circuit Court of Kanawha County

HARTLEY TRUCKING CO., INC.;;  
JOHN R. TANNER, and  
MARTHA A. HOY,

Defendants Below.

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**PLAINTIFF/RESPONDENT'S OPPOSITION  
TO THE PETITION FOR APPEAL**

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## **I. INTRODUCTION**

This is a sad case. The Plaintiff lost his father, mother and sister when a tractor trailer T-boned their van on I-64 East, at the Lee Street exit in Charleston, West Virginia. In addition to the grief Plaintiff suffered from the loss of his family, he suffered additional emotional stress when the tractor trailer's insurer jerked him around, abused the mediation process, and lied to him in order to gain strategic advantage during settlement negotiations.

The second and third mediations in this case were held in Judge Zakaib's chambers and he was deeply troubled by the actions of the National Indemnity insurance company and its General Counsel, Joseph Casaccio. After the case was settled, he *sua sponte* raised the issue of whether National Indemnity and Casaccio should be sanctioned for their conduct and instructed the parties to conduct discovery on that issue.

Following this discovery phase, Judge Zakaib held a hearing and at the conclusion of that hearing, he determined that National Indemnity had abused the settlement and mediation process, violated the Trial Court Rules, and intentionally lied to the Plaintiff to gain strategic advantage during the settlement and mediation process. See Order dated August 22, 2008, attached as Exhibit A. In order to address this improper conduct, Judge Zakaib awarded the Plaintiff \$225,000 in sanctions and Plaintiff's counsel \$48,821.79 in fees and expenses.

As set forth below, Judge Zakaib's factual findings that National Indemnity and Casaccio committed egregious acts of misconduct are not clearly erroneous nor did he abuse his discretion when he determined that such conduct warranted sanctions. For these reasons, and because Petitioner's Appeal is untimely, this Petition should be rejected.

## **II. FACTS AND PROCEDURAL BACKGROUND**

This case involves the May 30, 2003, vehicular accident that killed Charles, Norma and Mary

Curtiss. (Exhibit A, Finding of Fact 1 (hereinafter “FOF \_\_\_” or “COL \_\_\_” (Conclusion of Law)). On May 26, 2005, a wrongful death action was filed by Harold A. Curtiss, as Executor and Administrator, alleging that the accident was caused by the negligence of John Tanner and Hartley Trucking Co. (“Plaintiffs”). Exhibit A, FOF 1.

On March 2, 2006, the Circuit Court ordered the parties to complete mediation in this case by November 17, 2006. The trial in this case was scheduled for December 3, 2006. Exhibit A, FOF 2.

Pursuant to Trial Court Rule 25.10(1), a party with full decision making authority is required to attend mediation. Additionally, pursuant to Rule 25.10(3) a “representative of the insurance carrier for any insured party, which representative has full decision making discretion to examine and resolve issues and make decisions” must also attend the mediation. This requirement was particularly important in this case because the corporate defendant, Hartley Trucking, had declared bankruptcy. Exhibit A, COL 1. The bankruptcy stay applicable to Hartley Trucking was lifted only to permit Plaintiffs to recover the proceeds of Hartley Trucking’s insurance policy. Thus, Hartley Trucking’s insurer was the only entity that could resolve this case on behalf of the defendants. Exhibit A, COL 1.

The mediation in this case was scheduled for November 10, 2006. Prior to the mediation, the mediator, Don O’Dell, Esq., sent a letter to the parties instructing them that:

The mediation will be governed by the West Virginia Trial Court Rules; therefore, pursuant to Rule 25.10, the parties, counsel, and a representative of each insurance carrier with full decision-making discretion are required to appear.

On October 16, 2006, defendants' insurer, Converium, entered into an agreement to sell its assets to National Indemnity Company. Exhibit A, FOF 4. Pursuant to the terms of this agreement, any settlement by Converium entered into after November 1, 2006, in an amount greater than \$500,000, had to be approved by a representative of National Indemnity:

- (b) Except for the Restructuring Transactions, or as set forth in Schedule 5.1 or any of the other Schedules hereto, or as otherwise contemplated by this Agreement or the Ancillary Agreements from the date hereof to and including the Closing Date, the Seller will not, without the prior written consent of the Purchaser (such consent not to be unreasonably withheld or delayed), permit the Company or any of its subsidiaries to directly or indirectly:

\* \* \*

- (xiv) settle or compromise any Action, other than (A) any claims or litigation for which the sole remedy is monetary damages in an amount less than \$500,000 . . . .

Article V, Section 5.1(b)(xiv) of the Stock Purchase Agreement, see Exhibit A, FOF 4. According to National Indemnity, Mr. Casaccio was the sole National Indemnity employee with the authority to settle the case.

This case had a settlement value of more than \$500,000 and thus National Indemnity's consent was required. Factors that support this valuation of the case include:

- A. Mr. Curtiss's father, mother and only sibling were killed in the accident.
- B. The driver of the tractor-trailer that killed Mr. Curtiss's family took no action to avoid the accident for at least five seconds prior to the accident.
- C. The driver of the tractor-trailer had started his shift more than fifteen hours prior to the accident.

- D. The driver's employer, Hartley Trucking, failed to train the driver, as admitted by defendant's own consulting expert.

Exhibit A, FOF 6.

No representative of National Indemnity attended the November 10, 2006 mediation. Additionally, the fact that Converium could not settle this case without National Indemnity's consent was withheld from Plaintiff, Plaintiff's counsel, and the mediator. At the beginning of the mediation, Ms. Knapp, Converium's representative at the mediation, affirmatively misled the Plaintiff, Plaintiff's counsel, and the mediator by informing them that she had "full authority to settle the case." Exhibit A, FOF 7. Despite the fact that National Indemnity was the only company with actual authority to settle this case in an amount in excess of \$500,000, neither National Indemnity, Casaccio nor any other representative of National Indemnity appeared at the mediation nor were they available by phone. Exhibit A, FOF 10.

At the mediation, Converium made an unqualified offer of \$700,000 to settle the case. Exhibit A, FOF 11. After that offer was rejected by Plaintiff, Converium determined that the settlement value of this case was \$900,000, and accordingly, wanted to pay that amount to settle all claims against its insureds, Hartley Trucking and Mr. Tanner. Exhibit A, FOF 11. However, because of the pending asset sale and because this settlement was in an amount greater than \$500,000, Plaintiff was advised for the first time at the conclusion of the mediation that no settlement could be consummated unless it was approved by National Indemnity. Exhibit A, FOF 11. Of Course, Plaintiff and Plaintiff's counsel were shocked by this sequence of events as Converium had unconditionally offered more than \$500,000 to settle the case during the mediation and had never disclosed any requirement that such offer had to be approved by a company that

Plaintiff, Plaintiff's counsel, and the mediator didn't even know was involved in the case. Ms. Knapp then unequivocally promised Plaintiff, Plaintiff's counsel, and the mediator that Plaintiff's acceptance of the \$900,000 offer would not be used as bargaining leverage against him if National Indemnity refused to settle the case. Exhibit A, FOF 13.

Following the mediation, Casaccio and National Indemnity instructed Converium that it was not authorized to enter into a settlement for that amount, despite the fact that Converium valued the case at \$900,000. Exhibit A, FOF 12.

In the week following the November 10, 2006 mediation, Converium reduced the settlement offer from \$900,000 to \$350,000 at the direction of National Indemnity despite Converium's prior unconditional offer of \$700,000. Exhibit A, FOF 13-14. Thus, Casaccio and National Indemnity were now directly controlling Converium's actions even in regard to settlement amounts below \$500,000. In his deposition, Casaccio admitted that he was using the discovery of Plaintiff's bottom line, *i.e.*, that Plaintiff would accept \$900,000 to resolve this case, to negotiate against him, despite Ms. Knapp's express, unqualified promise to the Plaintiff and the mediator that if Plaintiff accepted the \$900,000 offer, this fact would not be used against him. Exhibit A, FOF 13.

The Circuit Court then ordered the parties to mediate the case on November 27, 2006, to determine whether it could be resolved. The Court further instructed the mediator to inform the parties that certain individuals were required to attend the November 27, 2006, mediation. A representative of National Indemnity was included in the list of those required to attend. Exhibit A, FOF 16.

In preparing for the second mediation, National Indemnity decided that it would "need to take a tough stand on liability . . . in order to test brother/son's [Mr. Curtiss's] mettle. . ." Exhibit A, FOF

17. On November 27, 2006, Casaccio did not appear at the mediation. Instead, he notified the Court that he had planned to attend the mediation but due to a missed flight connection he was unable to attend. Exhibit A, FOF 18. So for the second time, no representative of National Indemnity Co. appeared at the mediation. Since in Casaccio's absence no one at the mediation had the authority to settle the case, it is unsurprising that the case again did not settle.

Judge Zakaib then ordered a third mediation for November 28, 2006, and again required Mr. Casaccio to appear before the Court. Exhibit A, FOF 19. This time Mr. Casaccio – who is a lawyer and General Counsel for National Indemnity – appeared before the Court and participated in the mediation, which took place in Judge Zakaib's chambers. Exhibit A, COL 2. At no point during the proceeding did Casaccio challenge the Court's jurisdiction to require his presence. Exhibit A, COL 2. Ultimately, the case was settled for \$850,000 when, due to the outrageous conduct of Mr. Casaccio, the excess carrier contributed monies to the settlement to which it had no obligation to pay (since the primary policy was not exhausted) in order to resolve the case. Exhibit A, FOF 19.

On December 13, 2006, this Court held the summary proceeding in this case and ratified the settlement and proposed distribution of the settlement proceeds. During that proceeding, the Court *sua sponte* raised and set for hearing the issue of whether the conduct of Mr. Casaccio or National Indemnity Co. warranted sanctions under either West Virginia Trial Court Rule 25.10 or the inherent powers of the Court. Exhibit A, FOF 20.

Following this hearing, the Court permitted the Plaintiff to conduct discovery to establish the facts regarding the Petitioners' conduct. During this discovery phase the Plaintiff proved the facts set forth above regarding the manner in which National Indemnity and Casaccio inappropriately controlled Converium's actions during the settlement process. Exhibit A, FOF 12-17, 21. Other

evidence established during this process included National Indemnity's 30(b)(7) representative's admission that "it was inappropriate" for Converium to withdraw the \$700,000 offer made at the first mediation and replace it with a \$350,000 offer. Exhibit A, FOF 21. The evidence also established that as a result of the Petitioners' misconduct, Plaintiff and his wife suffered severe psychological problems requiring treatment by a psychologist, Dr. Lola Weir. Exhibit A, FOF 22.

After hearing the evidence concerning this matter Judge Zakaib found that National Indemnity and Casaccio's actions did in fact warrant sanctions. As a result, on August 22, 2008, the Court issued an Order finding:

- that National Indemnity and Casaccio assumed control of the settlement of this case (Exhibit A, FOF 4);
- that National Indemnity was estopped from claiming that it was unaware of the November 10, 2006 mediation (Exhibit A, FOF 5);
- that Plaintiff, Plaintiff's Counsel and the Mediator were affirmatively misled by Converium's representative at the mediation (Exhibit A, FOF 7);
- despite the fact that pursuant to the purchase agreement it was the only entity with ultimate settlement authority, National Indemnity failed to attend the first two mediations (Exhibit A, FOF 10);
- neither Plaintiff, Plaintiff's counsel, nor the mediator were aware of National Indemnity's involvement until the conclusion of the first mediation (Exhibit A, FOF 11);
- National Indemnity controlled settlement negotiations in the case and acted through Converium (Exhibit A, FOF 12-17, 21);
- despite Ms. Knapp's unqualified promise to Plaintiff that it would not use the knowledge of his bottom line to bargain against him, National Indemnity and Casaccio used this knowledge to bargain against Plaintiff and to "test his mettle" (Exhibit A, FOF 13,17);
- that Casaccio's testimony in this case was, in part, untruthful (Exhibit A, FOF 14);

- that National Indemnity's 30(b)(7) representative admitted that Plaintiff was treated inappropriately (Exhibit A, FOF 21);
- that as a result of National Indemnity and Casaccio's actions the Plaintiff suffered severe psychological problems (Exhibit A, FOF 22);
- that National Indemnity and Casaccio benefitted from their wrongful conduct to the detriment of Plaintiff and Plaintiff's counsel (Exhibit A, FOF 23-25).

As a result of National Indemnity and Casaccio's wrongful conduct, Judge Zakaib found that they should be sanctioned. Specifically, he found that the Plaintiff should be awarded \$50,000 representing the difference between the original settlement offer (\$900,000) and the ultimate settlement paid (\$850,000); that Plaintiff should be awarded \$25,000 for compensation for his injuries; and that National Indemnity and Casaccio should pay an additional \$150,000 for their improper conduct. Thus Plaintiff was awarded a total of \$225,000 in sanctions. See Exhibit A, at p. 12.

Judge Zakaib also determined that National Indemnity and Casaccio should pay a portion of Plaintiff's attorney fees incurred after the first mediation. Following the hearing, Plaintiff's counsel submitted an affidavit demonstrating that \$115,279.98 in fees and expenses had been incurred following the mediation as a direct result of Petitioners' improper conduct. On February 22, 2010, the Court issued its final order which awarded attorney's fees and expenses in the amount of \$48,821.79 *i.e.*, less than half of the amount actually expended. See Exhibit B.

However, due to a clerical error, the final order was not sent to the Petitioner's counsel on February 22, 2010. Ultimately, Petitioners received the final order on July 2, 2010, and Judge Zakaib issued another order clarifying that Plaintiff's appeal time began to run on July 2, 2010. (See Exhibit C, 5(c)). Thus, pursuant to Rule 3(a) Petitioner's appeal was due on November 3, 2010,

(four months after July 2, 2010, the date he concedes he received the Order), a Wednesday. However, Petitioner did not file this Petition until November 5, 2010.

### **III. ARGUMENT**

#### **A. Petitioner's Appeal Is Untimely.**

##### **1. Pursuant to W. Va. R. App. Procedure 3(a), Petitioners Were Required to File Their Appeal Within Four Months of the Entry of the Final Order.**

The initial problem with National Indemnity and Casaccio's appeal is that it is untimely. Pursuant to W. Va. R. App. Pro. 3(a), "No petition shall be presented for an appeal . . . which shall have been entered more than four months before such petition is filed. . ." Thus, in order to be timely, the Petitioners' Petition had to be filed within four months of the entry of the final order.

##### **2. The February 22, 2010 Order Was a Final Order Pursuant to Rule 54(a) Because it Disposed of All Issues Between the Parties.**

The Circuit Court's Order disposing of all substantive issues in the case was entered on August 22, 2008. At that time, the only remaining issue was whether the Court would sanction Casaccio and National Indemnity for their conduct. When the Circuit Court issued its Final Order ("Final Order") on February 22, 2010, which awarded the sanctions against Casaccio and National Indemnity, all issues were resolved in this case and the order was appealable and thus, final pursuant to Rule 54(a). See Exhibits A and B.

##### **3. Due to a Clerical Error, Petitioners Did Not Receive the Final Order on February 22, 2010. However, Petitioners Concede They Received the Court's Final Order on July 2, 2010 at the Latest. Therefore, Their Time to Appeal Began Running on July 2, 2010, and Expired on November 3, 2010.**

Unfortunately, the Circuit Clerk's office either failed to send a copy of the Final Order to

Petitioners' counsel or failed to document that it sent a copy of the Order to Petitioners' counsel. As a result, the Circuit Court found that the Petitioners' appeal time did not begin to run until they actually received the February 22, 2010 Final Order. Petitioners' concede that they received the Court's Final Order by July 2, 2010, and for that reason, Judge Zakaib subsequently entered an order clarifying that Petitioners' appeal time began to run on July 2, 2010. (See Exhibit C, 5(c)). Thus, Petitioners appeal was due on November 3, 2010 (a Wednesday). Petitioners did not file their appeal until November 5, 2010, thus missing the mandatory, jurisdictional deadline of four months set forth in W. V. R. App. 3(a).<sup>1</sup> Because the Petition is untimely, it must be rejected.

**B. Mr. Casaccio Has Waived Any Right to Challenge the Circuit Court's Jurisdiction.**

As an initial matter, Plaintiff notes that National Indemnity — after arguing since 2008 that the Circuit Court had no jurisdiction over it — now concedes that it does business in West Virginia and is subject to the Court's jurisdiction. However, Mr. Casaccio continues to contest the Circuit Court's jurisdiction to sanction him.

This argument is frivolous because Mr. Casaccio has waived any right to challenge the Circuit Court's jurisdiction. Mr. Casaccio, the General Counsel of National Indemnity, is a lawyer; he was personally involved in settlement negotiations in this case; he personally appeared before the Circuit Court on November 28, 2006; he personally participated in the mediation in Judge Zakaib's

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<sup>1</sup>Petitioners attempt to confuse this issue by claiming that they did not receive the final order until after the appeal period had run. This is simply untrue. Petitioners received the Court's Final Order on July 2, 2010. See Exhibit C. On November 1, 2010, Judge Zakaib issued an "Order Clarifying This Court's Prior Orders and Denying Mr. Casaccio and National Indemnity's Objections." See Exhibit C. This Order was not the Final Order and therefore, is irrelevant to the due date of Petitioners' Appeal.

chambers overseen by Judge Zakaib, and while participating in matters related to the case **he never once challenged this Circuit Court's jurisdiction over him or National Indemnity until such time as the Court informed him that it was considering sanctions.** See Exhibit A, COL 2. Obviously, when a person enters a general appearance before a Court and chooses to not challenge its jurisdiction, that person consents to the Court's jurisdiction. See Syl. Pt. 5, Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986); Syl. Pt. 1, Stone v. Rudolph, 32 S.E.2d 742 (W. Va. 1944) (an appearance in an action for any purpose other than to question the jurisdiction of the court, or to set up a lack of process, or defective service is a general appearance). When Judge Zakaib ordered Mr. Casaccio to appear at the mediation, he could have chosen to challenge the Circuit Court's authority to do so but did not. Lemley, 343 S.E.2d at 108. Mr. Casaccio, having previously appeared generally and consented to this Court's jurisdiction cannot now challenge that jurisdiction because he does not like the result. See Vanscoy v. Anger, 510 S.E.2d 283 (W. Va. 1998).

**C. The Circuit Court's Award of Sanctions Was Proper.**

Petitioners challenge all aspects of Judge Zakaib's award of sanctions, contending that he had no authority to award sanctions, that the record did not support an award of sanctions, and that the amount of sanctions was improper. Each of these arguments is wrong.

**1. Judge Zakaib Had the Right to Sanction the Petitioners in This Case Pursuant to the Court's Inherent Authority and Trial Court Rule 25.10.**

It is beyond cavil that Judge Zakaib has the authority to oversee and regulate the conduct of the parties and counsel who appear before the Court and participate in Court-ordered mediation. This power stems from a variety of sources including the Circuit Court's inherent authority, Trial Court Rule 25.10 and the West Virginia Long Arm Statute, W. Va. Code § 56-3-33.

**a. The Circuit Court Did Not Exceed Its Legitimate “Inherent Authority.”**

This court has repeatedly held that a Circuit Court has the inherent authority to regulate the conduct of the parties and counsel that appear before it. See Syllabus Point 3, Shields v. Romine, 13 S.E.2d 16 (W. Va. 1940) (a court has inherent power to do all things that are reasonably necessary for administration of justice within the scope of its jurisdiction); State ex rel. Rees v. Hatcher, 591 S.E.2d 304, 307 (W. Va. 2003) (included within the circuit court’s inherent power is the power to sanction). Judge Zakaib made a factual finding in this case that National Indemnity and Mr. Casaccio were actively involved in the negotiation and mediation of this case. Exhibit A, FOF 12-17, 21. Given that Casaccio personally participated in the November 28, 2010, mediation held in Judge Zakaib’s chambers, this finding is not clearly erroneous. See Exhibit A, FOF 10-12, 18-21, COL 11-12.

Given that National Indemnity and Casaccio appeared before Judge Zakaib in this case, if his findings that they engaged in egregious misconduct are supported by the record and not clearly erroneous, then Judge Zakaib possessed the inherent authority to sanction Petitioners.

**b. Judge Zakaib Properly Found that Petitioners’ Engaged in the Mediation Process in this Case and Therefore, were Subject to Trial Court Rule 25.10.**

Judge Zakaib’s findings that the Petitioners had actual or imputed knowledge of the November 10, 2006, mediation and that the Petitioners actively participated in the settlement and mediation process is also not clearly erroneous. See Exhibit A, FOF 12-17, 21, COL 1, 2, 9-10. The text of Rule 25.10 states as follows:

**Rule 25.10 Appearances; Sanctions.**

The following persons, if furnished reasonable notice, are

required to appear at the mediation session: (1) each party or the party's representative having full decision-making discretion to examine and resolve issues; (2) each party's counsel of record; and (3) a representative of the insurance carrier for any insured party, which representative has full decision-making discretion to examine and resolve issues and make decisions. Any party or representative may be excused by the court or by agreement of the parties and the mediator. If a party or its representative, counsel, or insurance carrier fails to appear at the mediation session without good cause or appears without decision-making discretion, the court *sua sponte* or upon motion may impose sanctions, including an award of reasonable mediator and attorney fees and other costs, against the responsible party.

Petitioners' arguments that they do not fall within the scope of Rule 25.10 are simply wrong.

Petitioners' statement that it was not the insurer in this case is disingenuous. Almost a month prior to the first mediation in this case, Converium and National Indemnity reached an agreement whereby National Indemnity purchased Converium's assets. Exhibit A, FOF 4. As part of the deal, in Article V, Section 5.1(b)(xiv) of the purchase agreement, National Indemnity barred Converium from settling any case in an amount of more than \$500,000 without National Indemnity's express consent. Exhibit A, FOF 5. According to National Indemnity and Casaccio, Cassacio was the person within National Indemnity who had the authority to approve such a settlement.

Finally, regardless of whether National Indemnity or Casaccio had the right or obligation to participate in the settlement and negotiation process, it is undisputed that they chose to participate. Exhibit A, FOF 12-19, 21. If an insurer (acting through its representative) chooses to inject itself into the mediation process and actually attends the mediation of the case, they cannot later claim they do not fall within the Trial Court Rules governing mediation. It's that simple.

## **2. The Circuit Court's Order Awarding Sanctions Is Supported By the Record.**

Petitioner's argument that Judge Zakaib's ruling was not supported by the record is also unavailing.

In the underlying accident, the Plaintiff's entire family was killed. Obviously, the Defendants, Defendants' counsel, and Defendants' insurers have an obligation to vigorously defend their respective interests—the system both permits and expects such vigorous advocacy. However, there is no place in the system for lying and breaking the rules, particularly, when such behavior is not the result of an accident but is rather part of a deliberate strategy designed to secure an advantage over the other party.

Judge Zakaib made factual findings that this is exactly what happened in this case: that Plaintiff and Plaintiff's counsel were affirmatively misled at the mediation (Exhibit A, FOF 6); that National Indemnity and Casaccio directly participated in the settlement and mediation process and acted improperly while doing so (Exhibit A, FOF 12-17, COL 9-12); that Casaccio's testimony regarding the events at issue was, at least in part, untruthful (Exhibit A, FOF 14); and even National Indemnity's Vice President, Mr. Ahrendt, testified that some of its actions during the process were "inappropriate." Exhibit A, FOF 21.

Judge Zakaib also expressly found that the Petitioners profited from their misconduct and Plaintiff was thereby injured. The record was un rebutted that as a result of National Indemnity and Casaccio's misconduct Plaintiff and his wife were required to seek psychological counseling and settled the case for less than they otherwise would have, had the misconduct not occurred. Exhibit A, FOF 21-22. These factual findings are supported by the record, and are not clearly erroneous.

**3. The Amount of Circuit Court's Sanction Award Was Carefully Crafted To Address The Petitioners' Misconduct.**

Petitioners' argument that the Circuit Court's award was too harsh and not reasonably calculated to address the alleged misconduct is also wrong.

The Circuit Court found that as a result of their misconduct Plaintiff settled the case for \$50,000 less than he otherwise would have. Thus, as a result of Petitioners' misconduct Plaintiff received \$50,000 less than he otherwise would have and National Indemnity saved \$125,000.<sup>2</sup> The sanctions awarded by Judge Zakaib to the Plaintiff totaled \$225,000 and were broken down as follows: (1) \$50,000 representing the difference between \$900,000 and \$850,000; (2) \$25,000 as compensation for Plaintiff's injuries; and (3) \$150,000 to punish Casaccio and National Indemnity. See Exhibit A, Section III(1-3). Thus, the total award to Plaintiff was four and one-half times his actual loss.

Judge Zakaib also found that Plaintiff's counsel were entitled to recover fees and expenses caused by Petitioners' misconduct. On August 29, 2008, Plaintiff's counsel submitted a sworn affidavit that the total attorney's fees and expenses directly attributable to Petitioners' misconduct were: \$115,279.98 (fees of \$105,286.25; expenses of \$9,996.73). On February 22, 2010, the Circuit Court awarded Plaintiff's counsel \$48,821.79 or less than half the requested amount.

Clearly, the amounts awarded by Judge Zakaib were well within his discretion, supported by the evidence, and not excessive. This Court has previously held that in formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged

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<sup>2</sup>National Indemnity profited by more than \$50,000 from their misconduct because \$75,000 was contributed to the ultimate settlement by the excess carrier, who had no obligation to pay since the primary policy was not exhausted.

wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case. Syl. Pt. 6, State ex rel. Richmond v. Sanders, 697 S.E.2d 139 (W. Va. 2010). Clearly, Judge Zakaib's order complies with these requirements. He articulated the wrongful conduct that required sanction, he explained his reasons why a sanction was appropriate, and weighed the impact the misconduct had on the outcome of the case. See Exhibit A. As such, the Court did not abuse its discretion.

**D. The Abstracts of Judgment Were Properly Issued By The Circuit Clerk of Kanawha County.**

Finally, Petitioners argue that the Court's February 22, 2010 Order is not a judgment and therefore, no abstracts of judgment can be entered. Again, this argument is simply wrong and was properly rejected by the Circuit Court when raised below.

Pursuant to Rule 54(a), a Judgement "includes a decree and any order from which an appeal lies." There is no question that the Circuit Court's February 22, 2010 Order (Exhibit B) resolved all issues between the parties. Therefore, it is a final order from which appeal lies and constitutes a judgment.

Additionally, the Court's order required the Petitioners to pay monies to the Plaintiff and to Plaintiff's counsel. Pursuant to W. Va. Code § 38-3-2, Plaintiff was a judgment creditor "entitled to the benefit of [a] decree or order" and pursuant to W. Va. Code § 38-3-4 the clerk was required to deliver an abstract of judgment which was properly registered. Therefore, the

abstracts of judgment were proper.

#### IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully asks the Court to reject this Petition and to enter such other relief as it deems just.

Respectfully Submitted,



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and JOHN R. TANNER,

Defendants.

**PLAINTIFFS' PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER AWARDING SANCTIONS**

On May 15, 2008, the parties came before this Court and presented testimony, evidence, and argument on the issue of whether sanctions should be awarded against Joseph Casaccio and National Indemnity Company ("National Indemnity"). Plaintiffs are represented by Robert B. Allen, Pamela C. Deem, and Philip J. Combs of the law firm of Allen Guthrie McHugh & Thomas, PLLC, and Joseph Casaccio and National Indemnity are represented by Daniel R. Schuda of Schuda & Associates, PLLC. Upon full consideration of the motions, responses, affidavits, evidence, testimony, relevant authorities and argument of counsel, the Court hereby makes the following findings of fact, conclusions of law, and award of sanctions:

**I. FINDINGS OF FACT**

1. This case involves the May 30, 2003, vehicular accident that killed Charles, Norma and Mary Curtiss. On May 26, 2005, a wrongful death action was filed by Harold A. Curtiss, as

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CATHY S. GATSON, CLERK  
KANAWHA CO. CIRCUIT COURT



Executor and Administrator, alleging that the accident was caused by the negligence of John Tanner and Hartley Trucking Co. Although Hartley Trucking was bankrupt, it was insured by Converium and thus had insurance coverage for this claim.

2. On March 2, 2006, this Court ordered the parties to complete mediation in this case by November 17, 2006. The trial in this case was scheduled for December 3, 2006 (Plaintiffs' Exhibit 2).<sup>1</sup>

3. The parties selected Don O'Dell as the mediator. The initial court-ordered mediation took place on November 10, 2006, in Morgantown, West Virginia (Plaintiffs' Exhibit 3).

4. On October 16, 2006, National Indemnity, a division of Berkshire Hathaway Group, entered into a contract to purchase the assets of Converium AG, the parent company of Converium Insurance, the insurer of Hartley Trucking. Pursuant to Article V, Section 5.1(b)(xiv) of the Stock Purchase Agreement, Converium and National Indemnity entered into a contractual covenant that Converium was barred from settling any case for more than \$500,000 without first obtaining National Indemnity's consent:

- (b) Except for the Restructuring Transactions, or as set forth in Schedule 5.1 or any of the other Schedules hereto, or as otherwise contemplated by this Agreement or the Ancillary Agreements from the date hereof to and including the Closing Date, the Seller will not, without the prior written consent of the Purchaser (such consent not to be unreasonably withheld or delayed), permit the Company or any of its subsidiaries to directly or indirectly:

\* \* \*

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<sup>1</sup>The Exhibits referenced in this Order refer to the Exhibits introduced at the May 15, 2008 sanctions hearing.

- (xiv) settle or compromise any Action, other than (A) any claims or litigation for which the sole remedy is monetary damages in an amount less than \$500,000 . . . .

(Plaintiffs' Exhibit 5).

5. National Indemnity presented no evidence that following the execution of the Stock Purchase Agreement that it made any effort to identify the cases in Converium's portfolio that involved settlement values in excess of \$500,000 and thus, required consent pursuant to the contractual covenant contained in the Stock Purchase Agreement. Given this lack of effort to identify cases that fell (or might fall) within this category, National Indemnity is estopped from claiming that it had no notice of this case prior to November 10, 2006.

6. This case involved the death of Mr. Curtiss' immediate family and had a settlement value of more than \$500,000 as evidenced by Converium's unqualified offer of \$700,000 and proposal to settle for \$900,000.

7. The Plaintiffs, Plaintiffs' counsel, and the mediator were not informed that Converium did not have the authority to settle this case without National Indemnity's consent. In fact, Mr. and Mrs. Curtiss testified that Ms. Knapp affirmatively misled the Plaintiffs, Plaintiffs' counsel, and the mediator by informing them at the start of the mediation that she had "full authority to settle the case on behalf of all defendants." This testimony was unrebutted.

8. In fact, Ms. Knapp did not have authority to settle this case without National Indemnity's consent (Plaintiffs' Exhibit 5).

9. Joseph Casaccio is a Vice President of National Indemnity; John Arendt is a Vice President of National Indemnity.

10. Despite the fact that National Indemnity was the only company with actual authority to settle this case in an amount in excess of \$500,000, neither National Indemnity, Joseph Casaccio nor any other representative of National Indemnity appeared at the November 10, 2006 mediation.

11. At the mediation, Converium made a firm offer of \$700,000 to settle the case. After that offer was rejected by Plaintiffs, Converium determined that the settlement value of this case was \$900,000, and accordingly, wanted to pay that amount to settle all claims against its insureds, Hartley Trucking and Mr. Tanner. Plaintiffs accepted this offer and were advised for the first time, at the conclusion of the mediation, that the settlement could not be consummated unless it was approved by National Indemnity.

12. Following the mediation, Mr. Arendt, Mr. Casaccio and National Indemnity assumed control of the settlement negotiations in this case and began directing the negotiations through Converium (Plaintiffs' Exhibit 7). National Indemnity instructed Converium to inform the Plaintiffs that it could not settle the case for \$900,000, despite the fact that Converium valued the case at \$900,000.

13. In the week following the November 10, 2006 mediation, Converium acting at the direction of National Indemnity reduced its settlement offer to the Curtiss family to \$350,000. This reduced settlement offer was made by Geoff Farrow of Converium acting pursuant to the direction of John Arendt and Joseph Casaccio of National Indemnity as evidenced by Mr. Farrow's confirming e-mail dated November 17, 2006, 9:11 a.m. (Plaintiffs' Exhibit 7). In his testimony before this Court, Joseph Casaccio admitted that National Indemnity used its discovery of Plaintiffs' bottom line, i.e., that Plaintiffs would accept \$900,000 to resolve this case, to negotiate against them. This was done despite Ms. Knapp's express, unqualified promise to the Plaintiffs and the mediator that

if Plaintiffs accepted the \$900,000 offer, Plaintiffs' willingness to go below \$1,000,000 to settle the case would not be used against them.

14. In his testimony before this Court, Mr. Casaccio stated that at the time National Indemnity directed Converium to offer \$350,000 to settle this case, he was unaware that: a) Converium had previously offered \$700,000 to settle this case; and b) there had been a mediation in this case. This Court rejects Mr. Casaccio's testimony on this point. Mr. Casaccio testified that in November 2006, he had more than thirteen years of experience adjusting, valuing, and resolving insurance claims. This Court finds it inconceivable that Mr. Casaccio and Mr. Arendt would have extensive conversations with Converium and its counsel following the November 10 mediation regarding the value of this case yet never discuss nor inquire whether settlement offers had been made or inquire about the status of the settlement and mediation process. Thus, having weighed Mr. Casaccio's testimony on this point in view of the facts and circumstances of this case, this Court rejects this portion of Mr. Casaccio's testimony and finds it to be untruthful.

15. In the alternative, if this Court were to credit Mr. Casaccio's testimony that National Indemnity was unaware of the mediation or the prior settlement offers, this Court would find that Plaintiff should not be penalized for National Indemnity and Converium's failure to properly communicate. After all, National Indemnity and Converium are the parties that had a contractual covenant requiring them to work together in regard to this case. Plaintiffs had no such contractual relationship with any party.

16. This Court then ordered the parties to try again to mediate this case on November 27, 2006, to determine whether this case could be resolved. This Court further instructed the mediator

to inform the parties that certain individuals were to attend the November 27, 2006, mediation. A representative of National Indemnity was included in those required to attend (Plaintiffs' Exhibit 4).

17. In preparing for the second mediation, defense counsel communicated to National Indemnity that the Defendants "need to take a tough stand on liability . . . in order to test brother/son's [Mr. Curtiss's] mettle. . ." (Plaintiffs' Exhibit 6).

18. On November 27, 2006, Mr. Casaccio did not appear. Instead, he notified the Court that he had planned to attend the mediation but due to a missed flight connection could not do so. Again, no representative of National Indemnity appeared at the mediation.

19. The Court again instructed Mr. Casaccio to appear at the third mediation and Mr. Casaccio did attend the mediation before the Court on November 28, 2006. The case settled at that mediation for \$850,000, which amount was \$50,000 less than the original amount proposed.

20. On December 13, 2006, this Court held the summary proceeding in this case and ratified the settlement and proposed distribution of the settlement proceeds. During that proceeding, this Court *sua sponte* instructed the parties that it was setting for hearing the issue of whether the conduct of Mr. Casaccio or National Indemnity warranted sanctions under either West Virginia Trial Court Rule 25.10 or the inherent powers of the Court.

21. In response to a question from Plaintiffs' counsel as to whether Mr. Curtiss was treated unfairly during the settlement process, National Indemnity's Vice-President, Mr. Arendt, testified that "it was inappropriate" for Converium to withdraw the \$700,000 offer made at the first mediation and replace it with a \$350,000 offer. Of course, this withdrawal was made at Mr. Arendt's direction (Plaintiffs' Exhibit 7).

22. At a result of the misconduct of Joseph Casaccio and National Indemnity and their control over the settlement and mediation process, Plaintiffs suffered severe psychological problems. Their psychological problems required the Plaintiffs to be treated by a psychologist, Dr. Lola Weir.

23. As a result of the misconduct of Joseph Casaccio and National Indemnity and their control over the settlement and mediation process, Plaintiffs settled this case for less than they otherwise would have accepted.

24. As a result of the misconduct of Joseph Casaccio and National Indemnity and their control over the settlement and mediation process, Plaintiffs' counsel expended substantial time and expense preparing for trial.

25. As a result of the misconduct of Joseph Casaccio and National Indemnity and their control over the settlement and mediation process, this Court was forced to expend substantial resources related to this case that it otherwise would not have been required to expend.

## **II. CONCLUSIONS OF LAW**

1. Pursuant to Trial Court Rule 25.10(1), a party with full decision making authority is required to attend mediation. Additionally, pursuant to Rule 25.10(3) a "representative of the insurance carrier for any insured party, which representative has full decision making discretion to examine and resolve issues and make decisions" must also attend mediation. Converium's representative at the mediation did not have decision-making authority to resolve this case. Pursuant to the Stock Purchase Agreement, National Indemnity was the only entity with authority to resolve this case, particularly, since the underlying tortfeasor was bankrupt. National Indemnity was therefore required to attend the mediation of this case, but did not.

2. This Court concludes that it has jurisdiction over Mr. Casaccio and National Indemnity to impose sanctions under Rule 25.10 and the inherent authority of the Court. This conclusion is based on the facts that: a) National Indemnity and Mr. Casaccio were actively involved in the settlement of this case, and in fact, after November 16, 2006, directed Converium's negotiations with the Plaintiffs; and b) Mr. Casaccio, a lawyer, appeared before this Court on behalf of National Indemnity at the mediation on November 28, 2006. At no time did he or National Indemnity challenge this Court's jurisdiction. A party that appears before a Court, and chooses to not challenge its jurisdiction consents thereto. Vanscoy v. Anger, 510 S.E.2d 283 (W. Va. 1998); Blankenship v. Estep, 496 S.E.2d 211 (W. Va. 1997); Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986); Stone v. Rudolph, 32 S.E.2d 742 (W. Va. 1944).

3. Further, even if the Court had not found that Mr. Casaccio waived his right to challenge the Court's jurisdiction, the Court would find that he is, in fact, subject to the jurisdiction of this Court. This Court has the right to regulate, and if appropriate, sanction the parties and counsel that come before it. It would make little sense to grant this Court the power to issue sanctions unless the parties and counsel that appear before it also fall within this Court's jurisdiction.

4. The Court also finds that Mr. Casaccio and National Indemnity fall within the Long-Arm Statute, W. Va. Code § 56-3-33(a). Mr. Casaccio was actively involved in the mediation of this case on National Indemnity's behalf. Under these facts, National Indemnity and Mr. Casaccio are subject to the jurisdiction of this Court. W. Va. Code § 56-3-33(a); West Virginia Trial Court Rule 25.10.

5. This Court is proceeding pursuant to Trial Court Rule 25.10 and its inherent authority. This Court is not considering imprisonment and the nature of these proceedings is civil and not criminal.

6. This Court has the inherent authority to regulate the conduct of the litigants and counsel that appear before it. If appropriate, this authority includes the authority to sanction the litigants or counsel. State ex rel. Rees v. Hatcher, 214 W. Va. 746, 749, 591 S.E.2d 304, 307 (2003).

7. The Stock Purchase Agreement by which National Indemnity purchased Converium, includes a contractual covenant that required the consent of National Indemnity to any settlement over the amount of \$500,000.

8. Pursuant to the Stock Purchase Agreement, National Indemnity purchased (and at all times relevant to this action owned) all liabilities incurred by Converium.

9. This Court finds that National Indemnity had either actual or imputed notice of the November 10, 2006 mediation. National Indemnity had a contractual covenant to work with Converium to resolve cases, such as this one, with a settlement value of more than \$500,000. It would be inappropriate for National Indemnity to take no action to investigate and identify cases falling with this covenant and then try to use that inaction to its benefit and Plaintiffs' detriment. It is undisputed that Converium, the company purchased by National Indemnity and with which National Indemnity had its contractual obligation had actual notice of the mediation.

10. This Court finds that the Joseph Casaccio and National Indemnity violated Trial Court Rule 25.10. Pursuant to the Stock Purchase Agreement between National Indemnity and Converium, Converium was not permitted to settle the Curtiss case in an amount greater than \$500,000. Despite

this fact, no representative of National Indemnity attended the November 10, 2006 mediation nor was available by telephone.

11. This Court finds that the Joseph Casaccio's and National Indemnity's conduct is also sanctionable pursuant to this Court's inherent authority. Actions taken by the Joseph Casaccio and National Indemnity that this Court views as sanctionable include the following:

- A. Pursuant to the Stock Purchase Agreement between National Indemnity and Converium, Converium was not permitted to pay more than \$500,000 to settle a case without National Indemnity's consent. Despite that fact, National Indemnity chose to neither send a representative to the mediation nor to make one available by telephone.
- B. The Plaintiffs and the mediator were misled because Converium concealed the fact that it had no authority to resolve this case in an amount greater than \$500,000. Indeed, this fact was not revealed to Plaintiffs, Plaintiffs' counsel or the mediator until after Converium had already made a firm offer of \$700,000 and at the end of the day convinced Plaintiffs to agree to accept \$900,000 in final settlement (the \$700,000 offer was obviously made in bad faith since, according to National Indemnity, the Converium representative had no authority to extend the offer). It was also not revealed until after the Plaintiffs had been lured into

telling Defendants their bottom line, i.e., the amount for which they were willing to settle the case.

- C. After Ms. Knapp represented to Plaintiffs that their willingness to accept the \$900,000 figure would not be used in any way to bargain against them, National Indemnity refused to pay the \$900,000 and, as admitted by Mr. Casaccio, immediately used that amount as the figure from which to negotiate, thus attempting to get Plaintiffs to agree to a lesser amount in violation of Converium's promise at the mediation.
- D. Following the close of the November 10, 2006, mediation, Ms. Knapp, on behalf of Defendants, agreed that the Defendants would contact the mediator that day. In fact, Defendants did not contact the mediator until approximately a week after they promised.
- E. When Defendants contacted the mediator, they offered Plaintiffs \$350,000 to settle this case acting at the direction of National Indemnity. This offer was made in bad faith. Defendants had previously extended an offer of \$700,000 to settle the case and Ms. Knapp had agreed that a fair value to resolve the case would be \$900,000.

F. After this Court ordered this case to be mediated a second time, National Indemnity again failed to appear for the mediation.

12. Given the above, this Court finds that the conduct of the Defendants warrants sanction, both as a result of the Defendants' violations of Trial Court Rule 25.10 and pursuant to the Court's inherent authority to impose sanctions to regulate the conduct of the counsel and parties that appear before it.

### III. AWARD OF SANCTIONS

As a result of the findings and conclusions made above, the Court awards sanctions against Joseph Casaccio and National Indemnity as follows:

1. \$50,000 to the Plaintiffs representing the difference between the initial \$900,000 and the eventual \$850,000 settlement offers;
2. \$25,000<sup>00</sup> to the Plaintiffs as compensation for the injuries caused by Joseph Casaccio and National Indemnity's conduct;
3. \$150,000<sup>00</sup> to the Plaintiffs to punish Joseph Casaccio and National Indemnity for its improper conduct;
4. Attorney fees expended by Plaintiffs' counsel from the date of the first court-ordered mediation, November 10, 2006, through the date of entry of this Order, including the time expended preparing for trial after November 10, 2006; and
5. Counsel for the Plaintiffs are directed to submit to the Court and Defendants' counsel an affidavit setting forth the total amount of their fees and hours expended as set forth in the previous paragraph. The Affidavit should be submitted within five days of the date of entry of this Order.

Defendants' counsel shall have 10 days to object to any aspect of these fees, should Defendants conclude such an objection is appropriate.

The objections of Joseph Casaccio and National Indemnity are noted.

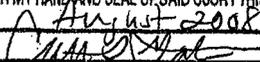
The Clerk is directed to send a certified copy of this order to counsel of record.

Entered: Aug 22, 2008

  
Honorable Paul Zakaib, Judge  
Circuit Court of Kanawha County, WV

PREPARED BY:

Philip Combs  
Robert B. Allen (WVSB #110)  
Pamela C. Deem (WVSB #976)  
Philip J. Combs (WVSB #6056)  
ALLEN GUTHRIE McHUGH & THOMAS, PLLC  
P.O. Box 3394  
Charleston, WV 25333-3394  
(304) 345-7250  
*Counsel for Plaintiffs*

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22  
DAY OF August 2008  
 CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED  
2010 FEB 22 PM 2:59  
CATHY S. GATSON  
CLERK OF COURT  
KANAWHA COUNTY

HAROLD A. CURTISS, Executor of  
the Estate of Norma Lee Curtiss,  
Deceased, HAROLD A. CURTISS,  
Administrator of the Estate of MARY  
LYNN CURTISS, Deceased; and  
HAROLD A. CURTISS, Executor of  
the Estate of Charles E. Curtiss,  
Deceased,

Plaintiffs,

v.

CIVIL ACTION NO. 05-C-1118

HARTLEY TRUCKING CO., INC.;  
JOHN R. TANNER, and MARTHA  
A. HOY,

Defendants.

ORDER REGARDING ATTORNEY FEES & EXPENSES

Upon review of the affidavit of Plaintiffs' counsel, Philip J. Combs, detailing Plaintiffs' attorney fees and expenses incurred for the period of November 10, 2006, to November 28, 2006, and for the period of November 29, 2006, to August 22, 2008; the objections of the Defendants to said affidavits; and the detailed and itemized review and analysis of the Defendants to Plaintiffs' affidavits of expenses, this Court concludes and finds that the Plaintiffs are entitled to an award of attorney fees and expenses as additional sanctions in this matter in the sum of \$48,821.79.

The objections of the parties aggrieved by this Order are noted.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Dated this 22<sup>d</sup> day of February, 2010.

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24  
DAY OF February 2010  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA act

Paul Zakab, Jr.  
PAUL ZAKAB, JR., CIRCUIT JUDGE

EXHIBIT  
B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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CATHY S. GATSON, CLERK  
KANAWHA CO. CIRCUIT COURT

HAROLD A. CURTISS, Executor of the  
Estate of Norma Lee Curtiss, Deceased;  
HAROLD A. CURTISS, Administrator of the  
Estate of Mary Lynn Curtiss, Deceased; and  
HAROLD A. CURTISS, Executor of the  
Estate of Charles E. Curtiss, Deceased

Plaintiffs,

v.

CIVIL ACTION NO. 05-C-1118  
(Judge Zakaib)

HARTLEY TRUCKING COMPANY, INC.,  
and JOHN R. TANNER,

Defendants.

**ORDER CLARIFYING THIS COURT'S PRIOR ORDERS AND  
DENYING MR. CASACCIO AND NATIONAL INDEMNITY'S OBJECTIONS**

1. On August 22, 2008, this Court entered its Order Awarding Sanctions against Joseph Casaccio and National Indemnity Company and to the Plaintiffs in this case.
2. On February 22, 2010, this Court issued its Order regarding Attorney Fees & Expenses in this case and awarded attorney's fees and expenses to the law firm of Allen Guthrie & Thomas, PLLC, in regard to the Court's prior sanctions award. Although this Order was not entitled "Final Order," it did in fact dispose of all issues in this case.
3. On July 2, 2010, Mr. Schuda, counsel for Mr. Casaccio and National Indemnity Company, contacted this Court ex parte and represented that due to a clerical error he had not received a copy of the February 22, 2010, Order. As a result, on July 6, 2010, this Court issued its Order Staying Execution of Judgment to ensure that Mr. Casaccio and National Indemnity Company had the opportunity to appeal this matter, if they chose to do so.



4. On September 21, 2010, Counsel for Mr. Casaccio and National Indemnity filed a Motion for Clarification of Rulings and Entry of Final Order alleging that no final order has been entered in this case. Plaintiffs oppose this motion and have also filed their Motion to Lift Stay of Execution of Judgment.

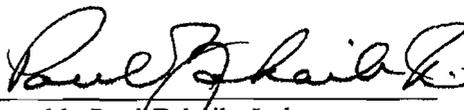
5. At this time, this Court denies Mr. Casaccio and National Indemnity's objections and issues the following Order:

a. Although not styled a Final Order, the February 22, 2010, Order did, in fact, resolve all issues in this case. Therefore, it is a final order from which an appeal may lie.

b. Counsel for Mr. Casaccio and National Indemnity Company have represented to the Court that due to a clerical error, they did not receive a copy of the February 22, 2010, Order until July 2, 2010. Therefore, the Court granted relief pursuant to Rule 60(b). This Court also finds that Mr. Casaccio and National Indemnity's time to file an appeal runs from July 2, 2010, rather than February 22, 2010, since this is the date upon which counsel represents they received the Court's Order.

c. Neither Mr. Casaccio nor National Indemnity Company have filed an appeal bond. This Court finds no reason to stay the execution of judgment and, therefore, the Stay of Execution of Judgment contained in the Court's July 6, 2010, Order is now lifted.

Entered: October 29, 2010

  
Honorable Paul Zakaib, Judge  
Circuit Court of Kanawha County, WV

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 3  
DAY OF NOV 2010  
  
CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA KW

PREPARED BY:

---

Robert B. Allen (WVSB #0110)  
Pamela C. Deem (WVSB #0976)  
Philip J. Combs (WVSB #6056)  
ALLEN GUTHRIE & THOMAS, PLLC  
P.O. Box 3394  
Charleston, WV 25333-3394  
(304) 345-7250  
*Counsel for Plaintiffs*

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

JOSEPH CASACCIO and  
NATIONAL INDEMNITY COMPANY,

Petitioners,

v.

Docket No. 10-080

HAROLD A. CURTISS, Executor of  
the Estate of Norma Lee Curtiss, Deceased,  
HAROLD A. CURTISS, Administrator of  
the Estate of Mary Lynn Curtiss, Deceased;  
and HAROLD A. CURTISS, Executor of the  
Estate of Charles E. Curtiss, Deceased,

Respondent/Plaintiff Below,

v.

CIVIL ACTION NO. 05-C-1118  
Circuit Court of Kanawha County

HARTLEY TRUCKING CO., INC.;  
JOHN R. TANNER, and  
MARTHA A. HOY,

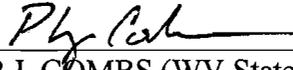
Defendants Below.

**CERTIFICATE OF SERVICE**

I, PHILIP J. COMBS, one of counsel for Plaintiff/Respondent, Harold A. Curtiss, Executor of the Estate of Norma Lee Curtis, Deceased; Harold A. Curtiss, Administrator of the Estate of Mary Lynn Curtiss, Deceased; and Harold A. Curtiss, Executor of the Estate of Charles E. Curtiss, Deceased, do hereby certify that service of the attached "Plaintiff/Respondent's Opposition to the Petition for Appeal" has been served this the 7th day of January, 2011 upon counsel of record by placing a true and exact copy thereof in the U. S. Mail, postage prepaid, addressed, as follows:

Daniel R. Schuda, Esq.  
Lynnette Simon Marshall, Esq.  
Schuda & Associates PLLC  
232 Capitol Street  
Charleston, West Virginia 25301

George N. Stewart, Esq.  
Zimmer Kunz, PLLC  
132 South Main Street, Suite 400  
Greensburg, PA 15601



---

PHILIP J. COMBS (WV State Bar No. 6056)  
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Post Office Box 3394  
Charleston, WV 25301  
(304) 345-7250

*Counsel for HAROLD A. CURTISS, Executor of the  
Estate of Norma Lee Curtiss, Deceased;  
HAROLD A. CURTISS, Administrator of the  
Estate of Mary Lynn Curtiss, Deceased; and  
HAROLD A. CURTISS, Executor of the  
Estate of Charles E. Curtiss, Deceased*